No. 3029.

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN W. ROBERTS,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Defendant in Error

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STATEMENT OF THE CASE.

The record will disclose that one Clifford Yarborough in 1898 or 1899 in the State of Tennessee sustained illicit relations with an octoroon negress who bore him a baby daughter born out of wedlock, who was named Eugenia. After some few years,

Yarborough openly acknowledged her as his daughter, caused her to adopt his name, sent her to school, and in 1915 or early in 1916 tried to adopt her as his daughter under the laws of Indiana. In March, 1916, he, accompanied by his daughter who was then about seventeen years old, journeyed from Indiana to Seattle, Washington, where he arrived on February 28th, 1916. Unacquainted with the city, he procured lodgings for himself and daughter at a house on Jackson Street. He engaged but one room with a small anteroom as a kitchen, and commenced to occupy these quarters with his daughter Eugenia. While a bed and separate cot were provided for them, they were compelled to and did use one room for about one week, when they moved to a more pretentious part of the city and engaged two rooms.

Yarborough brought with him in gold and currency seven thousand five hundred dollars in addition to some small bills for traveling expenses, which he deposited in the Dexter Horton Bank in Seattle on the day of his arrival. The second day after arrival, Yarborough picked up a chance acquaintance with a man by name of Moore, to whom

he incautiously revealed the fact that he had brought with him seven thousand five hundred dollars which he then had on deposit with the Dexter Horton Bank intimating during his conversation with Moore, that he would like to invest this sum after getting acquainted with local conditions. Moore later in the day told one Lonergan what he had learned about Yarborough. Moore had also learned of Eugenia through her father. Lonergan then, with full information about Yarborough and daughter, sought out his place of residence, and interviewed the landlady in whose house Yarborough was lodging. Lonergan after several days introduced Moore to defendant Coyne, and during a walk from the Busch Hotel down King Street, Coyne made certain statements to Moore and Lonergan, the substance of which was that some plan should be formulated whereby Yarborough might be swindled out of his money. (See pages 22-23 of Bill of Exceptions in lower court. I haven't the page number of the appellate record.)

After Yarborough had moved from Jackson Street, defendant, John W. Roberts, who was spoken of in the conversation between Moore, Lon-

ergan and Coyne, went out to the Jackson Street house where Yarborough had spent his first week in Seattle, and interviewed Mrs. Burke, the landlady or proprietress. She disclosed her suspicions to Roberts, intimating that improper relations were being sustained between Yarborough and the girl Eugenia.

After the interview between Coyne, Moore and Lonergan during the walk from the Busch Hotel, Lonergan and Moore went out to Yarborough's new lodgings. This visit took place on the afternoon of the 11th of March, 1916. Yarborough not being at home, they left his place of residence immediately.

From this point in the narrative of crime, Moore and Lonergan drop out. Coyne entered the scheme of things some few days earlier when the meeting between Coyne, Moore and Lonergan took place at the Busch Hotel, which was followed by the walk down Jackson Street, and the swindling plans suggested and elaborated on by Coyne to his companions.

There was some evidence of mysterious persons calling at Mrs. Burke's Jackson Street house, and repeated reference by her to a short, thickset dark

man whose identity is unknown. Moore and Lonergan visited Mrs. Burke's house in company and at separate times. They were quite active in eliciting all the information obtainable about Yarborough, and Mrs. Burke was equally free in voicing her suspicions concerning them.

From this Saturday afternoon, after their visit to Yarborough's new lodgings, they have nothing further to do with the case. From thence on, Coyne, Roberts and Nick Collins are the sole actors in the scheme of crime. Whether Moore and Lonergan were co-conspirators, who took advantage of the *locus poenitentiae* or not, is still an open question, except as it has been determined by the Grand Jury. A very careful consideration leaves counsel for the prosecution still in doubt as to whether Lonergan actually participated in the criminal operations of Coyne and Roberts. Moore strenuously denied any guilt or guilty knowledge in the premises, both in the Grand Jury room, and during his examination in the trial of the case. Lonergan never appeared after Saturday afternoon, March 11th. His whereabouts were never traced, and his participation in the scheme never known. An

inference might be indulged in that Lonergan and Coyne with some other unknown man visited Mrs. Burke's Jackson Street house to learn what they could of Yarborough. Mrs. Burke was not able to identify them, nor could she give any description of these men which would place Coyne and Lonergan in the conspiracy in its formative stages. Certain it is that Coyne and Lonergan were friends, and that Coyne got his information about Yarborough through Lonergan. Counsel for the prosecution during the preliminary investigation of the facts and from what the grand jury inquiry developed, was in doubt as to just what Lonergan had done in the early stages of what afterwards developed into the criminal conspiracy charged in the indictment. Lonergan never appeared before the Grand Jury. Trial preparation developed somewhat more fully the fact that Lonergan had something to do with the early plans of Coyne, and yet when the testimony was all taken, counsel were in greater doubt than ever as to just what the connection was between Roberts and Coyne, who clearly conspired and acted concertedly, and Lonergan and some third person of whom there is mention in

Mrs. Burke's testimony.

From the Saturday afternoon, March 11th, up to the consummation of the crime as charged in the indictment, which terminated when Yarborough was swindled out of his two thousand dollars and sent to Vancouver under guard, while his daughter was shipped East, the story is easily told. Nothing is left to conjecture or speculation in the narrative.

Roberts and Coyne went to Yarborough's Twelfth Avenue apartments, represented themselves as government officers, made arrangements for taxi cab to take him and his daughter to the Perry Hotel. Coyne went with father and daughter to the hotel, procured rooms for them, remained on guard in their apartment all night, kept them under surveillance during Sunday, until Roberts relieved him in his guard duty, and then went to prepare the way for Nick Collins to enter the conspiracy. Coyne then returned to the hotel, kept father and daughter under arrest, remained with them during Monday, and finally with Roberts persuaded Yarborough to give them two thousand dollars. Full details of what Roberts and Coyne said as to being government officers to Yarborough and daughter,

full details as to drawing the moneys from bank, of sending five hundred of it to an Eastern Bank to Eugenia's order for her support, two thousand to Coyne and Roberts, the trip to the depot, the trip to Vancouver wherein Yarborough was under guard by defendant Coyne and Nick Collins, all were told with an accuracy and corroboration which left no doubt in the minds of the jury or court as to Robert's guilt. Counsel's opening statement for the prosecution gives in circumstantial detail the whole criminal story.

ARGUMENT.

THE INDICTMENT:

Error is predicated upon the court's action in overruling demurrer and denying motion in arrest.

In order to better understand the indictment, we will make an analysis of it so that the court can see at a glance the part that each count played in charging the crime outlined in the opening statement in the record, as well as in this brief.

Counts one and two charged a conspiracy under Section 145 of the Penal Code. They were identical except that in one it was alleged that the defendants threatened to inform against Yarborough for an

alleged violation of a law of the United States, while in two the threat was made for a violation of a law of the United States by Yarborough. Count one treating the threat against Yarborough for an alleged violation of law of the United States was dismissed, and the cause went to the jury under count two and others. This conspiracy count was similar in its brevity and statement of its object to the indictments in the *Dahl* case, *Ding* case, and many other adjudicated federal appellate cases. It followed the language of the statute in stating the object of the conspiracy, and then followed with overt acts.

Count eight was also a conspiracy count under section thirty-two of the Penal Code. Here it followed the language of the statute. Although P. C. 32 includes two offenses—viz., pretending to be an officer and taking upon oneself to act as such; and assuming and pretending to be an officer, and demanding or obtaining money under such pretended character—yet the conspiracy was single—*John Gund Brewing Company vs. United States,* 207 Fed., and many other decided cases. The same overt acts of count two were set forth in count

eight, the only difference being count two follows language of P. C. 145 in stating object of conspiracy, and count eight follows language of P. C. 32 in stating its object.

This disposes of the conspiracy counts two and eight.

Counts three and five relate to the same offense stated in different language, as to counts six and seven. Four was dismissed. To understand these four counts, viz., three and five and six and seven, we must look to Penal Code Section thirty-two. This statute states two offenses, one, that of pretending to be a government officer, and assuming and taking it on oneself to act as such, the second, that of assuming and pretending to be a government officer, and in such pretended capacity demanding and obtaining money.

They cover two lines or phaze of the fraudulent personation of a government officer, which Congress saw fit to make a felony. In the one, the offender fraudulently impersonates a government officer, and makes an arrest, or does some other act under the pretense that he is doing an official act. In the other, he makes the same fraudulent representation,

and by virtue of it obtains money. All other impersonations fall short of an offense. Falsely pretending to be a secret service man, and strutting about in society as such to satisfy a personal vanity or to enjoy a temporary admiration or distinction from ones asociates, is not within the scope of P. C. 32. It is only when the pretender assumes the functions of a federal officer, or demands or obtains money while in the pretended character of a government officer, that he commits the offense provided for in Section Thirty-two.

Having in mind these two offenses, the court will see by inspection that counts three and five are intended to cover the first offense under Section thirty-two, viz., that of making the false representation and in the false and pretended capacity, acting as a government officer. The first of the counts (Count III) charges that defendant Roberts jointly with Coyne assumed and pretended to act as special agents of the Department of Justice then and there charged with the duty of enforcing the White Slave Traffic Act, whereas the second of these counts (Count V) charges that the defendants Roberts and Coyne jointly represented themselves

as officers of the United States authorized to make arrests in criminal cases.

Counts five and six cover the second offense under Section thirty-two, viz., that of making the false representation that they were government officers, and of obtaining two thousand dollars in their pretended capacity. Three and five cover their conduct in placing Yarborough under arrest, and acting as government officers, interrogating them as to their journey from East; keeping them under arrest, et cetera; while five and six cover the defendants' conduct in procuring two thousand dollars from Yarborough. The statement of the case, amply borne out by the record, shows that the two offenses under Section thirty-two were committed.

With this understanding we may say that counts three and five cover one offense stated in different terms.

The only thing left to the pleader was to make a count which would adequately cover the proof as to the kind of officer defendants represented themselves to be. The preliminary proof left the pleader in doubt as to just what the proof would show. It was clear that they had assumed the combined functions

of a deputy marshal and a special agent of the Department of Justice, charged with the duty of enforcing the White Slave Traffic Act. It was thought best in the draft of the indictment to cover both aspects of the representations and pretended acts under same, by stating specifically in separate counts the impersonation of a special agent of the Department of Justice charged with enforcement of White Slave Traffic Act, and the impersonation of an officer of the United States authorized to make arrests in criminal cases. It will be noted further that this count refers to officers generally, carefully avoiding the term "Deputy Marshal," who in fact at that time was the only authorized arresting officer of the United States.

One set of counts refers to the specific office of special agent—the other set to an officer in general terms charged with authority to make arrests in criminal cases. Observing this difference in describing the officer impersonated, counts three and five state the first offense under Section thirty-two, while five and six in different terms with respect to the officers impersonated cover the second offense, namely, demanding and receiving two thousand dol-

lars from Clifford Yarborough.

With the situation thus explained, we have two conspiracy counts with the same set of overt acts common to each, one to violate Section 145, the other to violate Section 32. We have in addition to the conspiracies, four counts charging the commission of two distinct offenses under Section 32. All four charge the consummated offense named. The jury returned a verdict of guilty on each count, and sentence generally was imposed under the verdict to run concurrently on all counts. Satisfactory proof in a record free from error on any one of these counts would sustain the verdict and judgment which follows it.

If conspiracy under Section 145 was not sufficient because Yarborough had not committed an offense, yet there remains the conspiracy in count eight to violate Section 32. If the conspiracy counts are inadequately covered by proof, there remains four counts charging the consummated offense.

If counsel is critical about count three in that proof showed Roberts to have made statements about the Mann Act and its enforcement, without any specific statement that he or they were special

agents, there is still ample proof that they pretended to be arresting officers of the United States. If there were any doubt as to which one of the defendants got Yarborough's two thousand dollars, (it apparently is Roberts' contention that Coyne got the money and spent it in company with Collins during a trip to El Paso in company with two women), the verdict must be sustained under the counts charging the assuming to act as government officers, for there was evidence of an overwhelming character showing the false arrest, the keeping under arrest, the act of Roberts in interrogating Mrs. Burke, and later in the day and during Sunday and Monday, the same conduct with respect to Yarborough and daughter.

A careful appreciation of the very complete manner in which the indictment in its various aspects covers and ties into the proof is a complete answer to the several points raised by counsel for the plaintiff in error for a finding of guilt on any one of the several counts, will sustain the verdict. This is so well established by the authorities that the statement of the proposition proves itself.

The argument relating to the unknown con-

spirators has no place in the four counts charging the consummated offense, for in these no others were mentioned.

The argument based on duplicity must likewise fall after careful inspection, first, of the two offenses under Section thirty-two, and then an examination of the pleading, which shows that in counts three and five, one offense is pleaded in different ways, and under five and six another and distinct offense is pleaded in different ways. One distinct offense, however, is stated in each one of the four consummated offense counts, and but one conspiracy is charged in each of the conspiracy counts.

ANSWERING THE POINTS OF PLAINTIFF IN ERROR.

While the foregoing in our judgment is a sufficient answer to plaintiff in error's brief, yet it may be of some service to this court to discuss some of his contentions from our standpoint, in order that the court may have our views on the entire case.

First, we do not for a moment concede that any of the counts were insufficient in either allegation or proof. There was ample evidence to sustain

the verdict of guilty on all counts.

First, as to count two. A sufficient answer to counsel is that we are dealing with conspiracy rather than the consummated offense. Inasmuch as the gist of the offense of conspiracy is the agreement to commit an offense followed by some preparation in the nature of an overt act tending to carry the conspiracy out, the purpose of the conspirators furnishes the test by which their conduct is measured, and not the fact that Yarborough had or had not committed the consummated offense under P. C. 145. The evidence of Roberts himself is to the effect that he and Coyne *thought* Yarborough had committed the offense of violating the White Slave Traffic Act. Roberts offered this explanation as a reason for taking any part in the case. He sent Eugenia Yarborough East, made arrangements for a deposit of money in an Eastern Bank through a Seattle Trust Company. This was amply borne out by Yarborough and daughter. If the jury found from the evidence that the pretenses used had the effect as a whole to induce Yarborough to part with his money through fear of a federal prosecution induced by his friendless condition and

ignorance of the law in question, even though guiltless, is not the criminal conspiracy of Roberts and Coyne complete? Are they any less guilty because Yarborough under all the proof was not guilty of violating the White Slave Traffic Act. They thought he was, accused him of it, and then by specious and devious methods secured his two thousand dollars. Their intention as a whole was to frighten him into parting with his money because of his supposed guilt. Inasmuch as it was a conspiracy to do this, and not the consummated offense, the whole case furnishes ample proof of their criminal purpose and plan with respect to Yarborough.

A careful examination shows but one adjudicated case for the consummated offense under P. C. 145, and this case is of little or no value. Apparently the proposition is in some aspects an original one, but in the case at bar in our opinion it is answered in the statement of it.

ALLEGED UNKNOWN CONSPIRATORS IN INDICTMENT THOUGH IN FACT KNOWN.

There are cases where the misstatement of such a fact would vitiate the indictment. In this case

how is Roberts prejudiced? Does it affect his own standing one way or the other? Of what avail is it to say that the elusive Lonergan who hovered about on the edges of the conspiracy when it was being planned, should have been named as a co-conspirator?

The evidence does not bear out Mr. Sullivan's statement that an untruthful statement was made in the indictment. Moore at all times denied guilt. Lonergan's part was never definitely known. Things points to his guilt in the grand jury room, and yet there was nothing to show it, and to this day, although we may have our suspicions, there is not evidence enough to base an indictment on, and this after all of the facts were sifted out and weighed in the trial court. Guilty knowledge that other men are conspiring without participation and concerted action is not an offense under P. C. 37. The statement of the prosecutor in his opening is a mere matter of opinion, his own private one which by inadvertence crept into the opening statement. It had no particular bearing on the case. Lonergan offered no evidence, gave no information, and what he personally did in the scheme of things had no

bearing on Roberts. Lonergan got Coyne, and Coyne got Roberts. Lonergan served only to round out the narrative, and to show the jury how by connected sequence of events Roberts and Coyne learned of Yarborough and daughter and their money, et cetera. No statement was made by the prosecution that Moore was ever a conspirator, and the testimony as a whole refutes any suggestion of guilt on his part.

There remains of those who had to do with this conspiracy Nick Collins who was not indicted. In the grand jury investigation there was mention of a man who accompanied Lonergan in a taxicab to hotel, and from hotel on a trip to a fruit store. He was also referred to by Yarborough as "a man who was on the boat with Coyne". His name was never known. His description was never given, and except to add mystery to the transaction, testimony covering this unknown mysterious stranger was of no value. His part in the scheme of crime was then unknown.

By a strange combination of circumstances, the evidence of Yarborough and daughter was procured through the agency of a police matron and special

agents of the Department of Justice at Chicago, who intercepted Eugenia, the girl, while in Chicago waiting for a train to go to Indiana. From her, the names of Yarborough, the father, and of Coyne and Roberts were learned. Later his testimony was secured by a special agent of the department from him in Tennessee, where he had gone by circuitous route after escaping from his captors in Vancouver, B. C. This affidavit figures later in the trial of the case, and becomes the subject matter of one of the assignments of error.

The case at this stage was still lacking in the development of many essential details. Lonergan's part was unknown. Moore had not been located, and Collins was unheard of.

During the course of the pleasure trip of Collins and Coyne from San Francisco to El Paso, during which counsel for plaintiff in error sought to introduce evidence of One Thousand Dollars spent on the women who were taken along, which also is made the basis of an assignment of error, these two, viz., Coyne and Collins, committed the independent and separate offense of violating the White Slave Traffic Act, for the women who were taken through and

into several Federal Districts in as many states were prostitutes, and were taken on the trip in question for immoral purposes. Information relating to this violation of law came to the authorities independently of the case at bar. Acting on this information, Coyne was arrested, indicted, tried and convicted in Texas, and sentenced to eighteen months in prison. Through information secured from the girls, Nick Collins was located in San Francisco after Coyne's conviction in Texas. Collins was indicted in San Francisco, and while on bail waiting trial for his offense in that jurisdiction, for the girls were taken through the Northern District of California, Collins related to the government officers his connection with the Coyne-Roberts conspiracy in Seattle. This information was secured long after the indictment had been returned against Coyne and Roberts, and within a few weeks of the trial of Roberts. Roberts was tried alone, the prosecution having moved for a separate trial for Roberts and a severance of the case. This order of severance and separate trial was granted, and Coyne was not tried for the reason that as he was then serving a substantial sentence for white slavery, the prosecu-

tion could save the government needless expense in bringing him from Leavenworth for trial.

Collins was brought as a witness from San Francisco, while the case against him there was still pending. The case as a whole was made when Collins' testimony in San Francisco and Coyne's statement while in jail at El Paso were given, together with what was learned from Yarborough and daughter and the Seattle witnesses. It will thus be seen that Collins never was known to the grand jurors, Lonergan was never apprehended, and consequently never interviewed, Moore always denied guilt, or guilty knowledge, and the grand jurors left in the dark entirely except as they might indulge in suspicion or inferences from Mrs. Burke's reference to these mysterious persons who called at her home to learn about Yarborough.

It will thus be seen that the indictment told no false story when mention was made of unknown conspirators.

The four remaining counts, of course, make no mention of any one except defendant Roberts and his joint defendant, Coyne, whose case was severed.

REPLY TO PLAINTIFF IN ERROR'S SUBDIVISION ENTITLED "INSUFFICIENCY OF THE INDICTMENT".

We think counsel's first point raised, viz., that under the conspiracy to violate Section 145, Penal Code, it is necessary to the offense that a crime should actually have been committed, was sufficiently answered in the general observations in this brief concerning the indictment at bar. Summarizing, however, we urge that inasmuch as a conspiracy to violate the act is charged, and Roberts has admitted in his testimony that he believed Yarborough had violated the White Slave Traffic Act, the crime is complete.

By analogy, the *Barnow* case at 60 L. Edition, page 157, reported in the 239 U. S. page 74, seems almost decisive of the contention raised by counsel for plaintiff in error. In that case it is said:

> "It is the false pretense of Federal authority that is the mischief to be cured * * *. Now, the mischief is much the same, and the power of Congress to prevent it is quite the same, *whether the pretender names an existing or a non-existing office or officer, or on the other hand does not particularize with respect to the office that he presumes to hold.* Obvious-

> ly, if the statute punished the offense only when an existing office was assumed, its penalties could be avoided by the easy device of naming a non-existing office."

Since the Supreme Court holds in this decision that the non-existence of the office which is assumed as a pretense of fraud does not bar responsibility before the criminal law, it would seem that the distortion of certain existing facts in the pretense of a violation of the Federal law, coupled with a claim and suggestion of power as a Federal officer to punish that conduct, is just as reprehensible as the conduct criticized by the court.

As illustrated by the case at bar, it is not always easy for even the trained lawyer, much less the ignorant and unlearned, to know whether certain conduct is or is not within the prohibition of the criminal law. But the purpose of the statute here involved is to prevent the Federal authority as exercised by its public officers from being dragged into disrepute in the estimation of the public.

See also

Littell vs. U. S., 169 Fed. 620.

The same reasoning applies in all its force to counsel's claim of error in the present case. Coun-

sel contends with severe logic that if Yarborough was not guilty, Roberts could not be guilty of threatening to inform against him for the purpose of swindling him out of money. A man's guilt, always dependent upon criminal intent, might or might not exist; yet the harm to society would be as great and the defendant's purpose to obtain money by this species of extortion be as criminal regardless of the victim's guilt or innocence. The best answer to counsel is that Roberts did swindle and extort two thousand dollars from Yarborough by means of his threat to inform, although Yarborough turned out finally to be innocent. His conduct led to the effective result without regard to Yarborough's real status.

Answering the criticism against the consummated counts, the indictment does not state to whom Roberts pretended to be a government officer. The indictment is in the language of the statute. The statute requires nothing to supplement it in describing the criminal offense. Terms of definite criminal import are used. To falsely personate another is an offense by statute in most states. Under the United States statute, for the purpose

of cheating or defrauding, it is an offense to impersonate a government officer and assume to act as such. Every necessary element of crime is contained in the statute, and offense is couched in the language of the statute, with the additional allegation that it was done within the district at a definite time "wilfully, knowingly and feloniously". This indictment in form practically follows the quoted language of the indictment in the *Barnow* case, *supra,* and the *Lamar* case.

We have answered counsel's claim of duplicity by showing in our analysis of the indictment how the two offenses under section thirty-two have been pleaded.

INSUFFICIENCY OF THE EVIDENCE.

Counsel indulge in the statement that there was not sufficient evidence to warrant or sustain a conviction. They say there is no evidence that Roberts represented himself as an officer. Bearing in mind that assuming and taking upon himself the functions of an officer in one set of counts, and obtaining money by means of his impersonation in the other, is the gist of the offense, do we not find from the evidence ample proof to support each set of

these counts?

Yarborough and daughter tell a connected story about the conduct of Roberts and Coyne at their Twelfth Avenue lodgings. These men, if Yarborough and daughter were to be believed at all, put them through a third degree inquisition which was quite effective. They charged Yarborough and daughter with a violation of white slave act, spoke of arrest and imprisonment, said something about bail, said they were government officers, and finally took them to the Perry Hotel, kept them under arrest until Monday night, and by threats, imprisonment and false representations secured two thousand dollars from Yarborough. The story of the crime is complete, and finds much to corroborate it in Roberts' own testimony. In addition we have a number of other witnesses who throw light here and there upon the early history of the conspiracy, as well as to corroborate essential and vital details of the offense. A very strong case was presented against Roberts, both on the conspiracy counts and on the consummated offense counts, and the jury could hardly have done otherwise than convict.

ERROR IN THE REJECTION OF EVIDENCE.

Due to the circumstances under which the record in this case was prepared, it seems proper to state that the bill of exceptions contains a much garbled and quite incomplete statement of the facts, and does not show all that took place with reference to the attempted impeachment of Yarborough by the Tennessee affidavit. The November term expiring on the first Monday of May was extended in April for the purpose of completing the District Court record by preparing and filing bill of exceptions. Writ of Error was sued out at the time the term was extended. Plaintiff in Error was given until June 30th to file his bill of exceptions, and time for filing record in this court extended until August 1st. Many errors were assigned, but no brief was furnished, and errors complained of not argued or assigned at any length. Long after the writ had been sued out, and within a few days of the last day for filing and settling bill of exceptions, to-wit, June 30th, counsel for plaintiff in error presented the bill of exceptions in present form for approval and allowance. Counsel who tried the case was then leaving for Bellingham to prepare an

important government civil case for trial. Other members of the office were exceptionally busy with a grand jury and other government matters. Counsel returned from Bellingham Friday, and on Saturday morning took up the matter of settling lower court record. No opportunity of adding to or supplementing a very poor and incomplete bill of exceptions, was permitted for trial counsel to go through the entire record and thus fill in and supplement the present meager bill of exceptions. In its principal points, with a rider prepared and pasted into the original which counsel for plaintiff in error desired be done rather than suffer delay, for he had but one month for preparation of his appellate record, the bill of exceptions tells a fairly complete story of the crime.

Upon the point that evidence concerning the Yarborough affidavit was rejected, it is not as clear as it might be, yet with the explanation offered the situation in the trial court is easily understood without going outside the record for additional facts. Counsel for the prosecution had the usual photostatic copy of a document furnished by the Department of Justice, but not authenticated. De-

fense counsel at trial made a number of loose rambling observations about it, and propounded some questions to Yarborough concerning an affidavit made by him in Tennessee to a government officer during the early investigation of the case. Yarborough freely admitted making the affidavit. He was then asked if he made the statement in that affidavit that Roberts had said to him that he, Roberts, was a government officer, asking if the term "government officer" was used. Yarborough said he couldn't remember. The counsel for Roberts asked the district attorney trying the case for copy of affidavit which was a part of the government's case file. Upon the district attorney's refusal, defense produced their own copy of the same affidavit, and proceeded to cross-examine from it.

At page 46 of Bill of Exceptions, the following questions and answers were given:

> MR. MORRIS: Q. "Mr. Martin, let me ask if the government has in its possession the affidavit to which I have referred, and which the witness has admitted that he made.
>
> MR. MARTIN: A. "Yes."
>
> MR. MORRIS: Q. "Will you allow me to see it?"

MR. MARTIN: A. "I do not think the government should turn over any statements made. We have our confidential files in this case. I have no other except a photostatic copy."

MR. MORRIS: "I will say that I have a copy of that in my possession, but I would like to use the original."

The court at this point sustained the objection. Counsel for defense in the first place could not get Yarborough to make a definite statement as to the contents of an affidavit which he had made months before, and had only read through once at time of making and had not seen aagin.

Not content with his answer, Mr. Morris in his effort to trap him tried to show that he had made this affidavit which in some minor details was not as full as his then statement on the witness stand. He had a copy of this, and Mr. Martin for the prosecution had one also. The government copy was not authenticated, and would not be legal evidence. Merely a photograph of document on file with the Department. Plaintiff and defendant's copies were alike. Instead of producing notary, proving signature and offering same, counsel for defense sought to use the government's copy to

impeach the government's witness when the witness didn't claim that affidavit stated everything or that it attempted to cover the subject, but did say it was truthful as far as it went, and that he couldn't remember its contents except in a general way.

The mere fact that the prosecution had a copy would not in any manner make it of greater evidential value than the copy in possession of defense. It would not bring out the facts surrounding the making of the affidavit. If the affidavit was silent as to details, it would further have to appear that Yarborough had attempted to give all details of the offense, and that so given his statement on the stand was so materially different as to justify the belief that he had not told the truth in the affidavit, or that he had misstated the facts on the witness stand. When Yarborough couldn't remember the contents of affidavit, counsel for the government was well within his rights in insisting that the regular methods and rules of impeachment be adhered to if counsel wished to discredit the witness. The officer who took this affidavit for the Department of Justice was not present, and the government had no means of knowing the extent of witness' examina-

tion by him when the affidavit was prepared. It was not prepared to meet or explain why the affidavit was not as full or complete as witness' oral testimony. Counsel for defense made no effort to ascertain whether the witness Yarborough had attempted to state all the facts at the time of making the affidavit, or whether he was ever asked concerning the representations of Yarborough when the affidavit was being made, or whether notary or stenographer took a shorthand statement of what was said; nor was Yarborough asked who condensed his remarks into and furnished the narrative form to which his statement was subsequently reduced in the affidavit. The defense having their own copy, and Yarborough's statement on the witness stand that he couldn't remember its text or substance except in a general way, seemed to welcome the opportunity to charge the prosecution with being unfair without laying any foundation for impeachment and following it up at the proper time by competent impeaching evidence.

Under these circumstances, we see no reason why the defense, with a similar copy in their possession, should be allowed to discredit the witness

by showing that government had a partial statement contained in a copy of an affidavit. No effort was made to specifically impeach nor to use their own copy by offering it in evidence. Mr. Morris did use it to ask a number of questions, but seemed in some curious way to wish to use the government's copy when he could not get the witness to deny making the statements in the affidavit. The affidavit in narrative form simply fell short of the detailed statement of the witness on the stand. His testimony was in all its essential details the same at all times. The judgment of conviction and sentence should be sustained.

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